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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

KAREN SWAIN et al.,
Plaintiffs and Appellants,

v.

CHRISTIAN LEWIS,
Defendant and Respondent.

A105003

(Alameda County
Super. Ct. No. 2001-032877)

Plaintiffs and appellants Karen Swain and Stephen Sheppard appeal the trial court's November 25, 2003, order granting respondent's motion to vacate the default and judgment previously entered against defendant and respondent Christian Lewis, and awarding appellant \$2,387.50 as attorney fees and costs reasonably incurred by appellants in connection with the default proceedings. Appellants ask us to reinstate the default and judgment, and order respondent to pay \$16,695 in attorney fees and \$542.71 in costs incurred in connection with the default proceedings, as well as the fees and costs appellants have incurred prosecuting this appeal.

Respondent requests that we affirm the trial court's order granting his motion to vacate the default and judgment, order appellants to pay respondent's reasonable attorney fees and costs incurred in connection with this appeal, and order appellants' counsel of record to pay sanctions for bringing a frivolous appeal.

We affirm the trial court's order in its entirety. We deny all of appellants' and respondent's other requests other than to award costs to respondent as the prevailing party.

BACKGROUND

Appellants ask us to strike the statement of the case contained in respondent's appellate brief because it fails to cite to the record. We cannot act on mere assertions in briefs as to matters not shown by the record. (*Muller v. Reagh* (1959) 170 Cal.App.2d 151.) Accordingly, we disregard any of respondent's statements of alleged facts that are not supported by the record. (*Weller v. Chavarria* (1965) 233 Cal.App.2d 234.)

Appellants filed their original complaint on December 3, 2001. Appellants contend, among other things, that the conduct of respondent, a one-time neighbor, has constituted a nuisance to them, that he has aided and abetted a physical attack on them, and that he has instigated and/or participated directly in a pattern of assaults, battery, vandalism, and burglary against appellants, causing them general and specific damages. Appellants also seek punitive damages.

Respondent filed a cross-complaint. Respondent also filed demurrers to appellants' first three complaints, all of which were sustained. Numerous case management conferences in the action have been held. An arbitration was also conducted in March, 2003, for which appellants did not appear, and an award was issued in favor of respondent.

Appellants, after filing a fourth amended complaint, to which respondent answered, filed a motion in pro per on May 13, 2003, for orders vacating the arbitration award and permitting them to file a fifth amended complaint. Appellants contend that a third party mail-served this motion to respondent's counsel on that same date, as indicated by a proof of service and a declaration of the third party submitted to the court below. The court granted appellants' motion to file a fifth amended complaint and vacated the arbitration award by written order filed on June 11, 2003, without any

opposition by respondent, which order the court mailed to respondent's counsel the following day.

Appellants filed their fifth amended complaint and obtained a summons on June 13, 2003. They did not serve the complaint or summons at that time. On June 16, 2003, appellants and respondent's counsel appeared at a case management conference. Appellants, with respondent's counsel present, told the court that they had filed an amended complaint after the court granted their motion for permission to do so. Respondent's counsel contended that respondent had not received a copy of appellants' motion or the complaint itself, at which point the court instructed appellants to serve respondent with their fifth amended complaint and provide respondent's counsel with a copy of their motion. Appellants did not serve the filed complaint to respondent's counsel at the hearing because of a concern that a third party attesting to service was required.

In late June, 2003, appellants substituted in new counsel, Jesse Ralph, who has stated by declaration that he personally mail-served to respondent's counsel the following documents on June 25, 2003, under separate proofs of service:

Appellants' Substitution of Attorney form, executed by all parties, which the court filed on June 27, 2003;

Appellants' fifth amended complaint and summons, along with several discovery requests; and

Appellants' Statements of Damages, listing \$600,000 in general damages for pain, suffering and inconvenience, and emotional distress; \$9,950 in special damages for medical expenses, loss of earnings, loss of future earnings, property damages, funeral expenses and moving expenses; and \$1,000,000 in punitive damages for a total of \$1,609,950.

Appellants contend that Ralph sent to the court and mail-served to respondent's counsel on August 4, 2003, a request for entry of default and court judgment, seeking

more than \$1.6 million in damages. On that same day, Ralph wrote to respondent's counsel about respondent's failure to respond to the discovery requests that he mail-served on June 25, 2003. Ralph did not refer to respondent's failure to file an answer to the fifth amended complaint, nor did he indicate that he was sending that same day to the court a request for entry of a default and a \$1.6 million court judgment against respondent.

Elizabeth Cohee, an associate with the Law Offices of George Holland, respondent's counsel of record, wrote to Ralph on August 11, 2003, stating that she was responding to "your letter and filing of August 4, 2003." She stated that her office had not received notice that appellants' new counsel was the attorney of record in the matter, notice of the court's ruling on the motion to file a fifth amended complaint, or service of the motion itself as ordered by the court after the last case management conference. Cohee also wrote, "[p]lease be advised that we will be moving to have the decision on the motion, as well as any default that you may attempt to perfect, set aside." Nothing in the record indicates that Ralph, after receiving this letter, subsequently served on respondent's counsel, albeit for the second time from his point of view, copies of the substitution of attorney forms, motion papers, fifth amended complaint or summons.

On August 19, 2003, the court filed appellants' request for entry of default and court judgment, and entered default against the respondent on that same date. The record also contains a notice mailed by the court to respondent's counsel on August 19, 2003, stating that the action had been scheduled for a September 25, 2003, civil uncontested hearing, thereby indicating that a default had been entered.

On September 3, 2003, respondent's counsel filed a case management statement for a September 19, 2003, conference. The record does not contain any statement filed by appellants before October 1, 2003. Respondent's counsel does not refer to service of a fifth amended complaint or entry of a default, and served the statement directly to the appellant parties rather than to their counsel. Respondent's counsel appeared for the

conference, but appellants' counsel did not, resulting in the court's scheduling of an October 17, 2003, case management conference and order to show cause hearing. Appellants served a case management conference statement and notice of the order to show cause on September 24, 2003, this time to appellants' counsel, and again did not refer to service of a fifth amended complaint or entry of a default.

Only appellants and their counsel appeared for the September 25, 2003, civil uncontested hearing. The court issued a default judgment on September 29, 2003, which found that respondent had been served with summons and complaint on June 25, 2003, and neglected to answer in the time allowed by law, and that a default had been entered as requested on August 19, 2003. Judgment was entered against respondent for \$501,814.86 in favor of appellant Karen Swain¹ and \$510,216 in favor of appellant Stephen Sheppard.² Another named defendant who is not a party to this appeal was found jointly and severally liable for these damages as well. Appellants mail-served notice of the default judgment to respondents' counsel the next day.

On October 7, 2003, respondent filed a motion to set aside the default judgment pursuant to Code of Civil Procedure section 473, subdivision (b) (section 473(b)) because default and judgment "were taken due to a failure of plaintiffs to comply with a direct order of this Court, which subsequently led to our surprise at the default and judgment being taken." Cohee stated by declaration that at the June 16, 2003, Case Management Conference, the court "ordered [appellants] to provide [respondent's] counsel with all the documents that had been recently filed by [appellants] in the case—notably the motion to set aside the arbitration award and the most recent amended complaint.

¹ These damages consisted of \$2,726.86 in special damages, \$60,000 in general damages, and \$439,088 in punitive damages.

² These damages consisted of \$3,777 in special damages, \$60,000 in general damages, and \$446,439 in punitive damages.

[¶] [Respondent's] counsel never received any of these documents. [¶] The default and judgment taken against [respondent] was a surprise to counsel in that we did not receive the documents ordered to be delivered to us by this Court. Our failure to file an answer to the most recent version of the Complaint and to defend our client against the request for default was not due to inexcusable neglect.”³

Appellants' opposition to the motion contended, among other things, that respondent's counsel's neglect, if any, was not excusable, that respondent deliberately refused to act in response to events that were known to his counsel and was too late in filing the motion, that respondent and his counsel should pay appellants' attorney fees and costs of \$16,695, including 74.20 hours of attorney time, and that respondent should post security for the judgment. Appellants' counsel later submitted a supplemental declaration further specifying his fees and costs.

At the November 19, 2003, hearing on the motion, Ralph acknowledged that he had not warned respondent's counsel that an answer to the fifth amended complaint was overdue before filing for default, although he was aware of cases stating counsel has an ethical obligation to provide such a warning. He contended, among other things, that Cohee knew of the default because she stated in her August 11, 2003, letter, “[p]lease be advised that we will be moving to have . . . any default that you may attempt to perfect . . . set aside.” Cohee argued, among other things, that respondent did not respond to the fifth amended complaint because they never received it, and denied having received it when she wrote her August 11, 2003, letter.

In its November 25, 2003, order, the court found good cause appeared to grant the motion pursuant to section 473(b), “based on the declaration of [respondent's] counsel

³ Respondent filed a second motion to set aside the default and judgment based on a lack of jurisdiction and extrinsic fraud. It is unclear whether this motion was dropped or if the court heard it. We do not discuss it further because we affirm the court's November 25, 2003, order, granting respondent's first motion, which was based on surprise.

that she did not receive [appellants'] most recent amended complaint. . . . Although the record indicates that [respondent's] counsel may have known on August 11, 2003, of [appellants'] intent to request entry of default, the Court concludes that [respondent's] filing of this Motion on October 7, 2003, does not constitute delay so significant as to warrant denial of the Motion.” The court vacated the August 19, 2003, default and the September 25, 2003, judgment, and ordered respondent to pay \$2,387.50 in fees and costs reasonably incurred by appellants in connection with the default proceedings. Appellants filed a timely notice of appeal of this order on December 15, 2003.

DISCUSSION

A court's order setting aside a default and a default judgment is appealable. (*Jones v. Interstate Recovery Service* (1984) 160 Cal.App.3d 925, 928.) As we have previously noted, the standard of review “for grants of section 473 motions is *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479 . . . , where our Supreme Court held: ‘It is the policy of the law to favor, whenever possible, a hearing on the merits. Appellate courts are much more disposed to affirm an order when the result is to compel a trial on the merits than when the default judgment is allowed to stand. [Citation.] Therefore, when a party in default moves promptly to seek relief, *very slight evidence is required to justify a trial court's order setting aside a default.* [Citation.] . . . The trial court's order granting relief was within its sound discretion and, *in the absence of a clear showing of abuse of discretion, should not be disturbed.* [Citations.] [¶] *The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason.* When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court. [Citations.]’ ” (Italics in original.) (*Uriarte v. United States Pipe & Foundry Co.* (1996) 51 Cal.App.4th 780, 789-790.)

We have no reason to disturb the trial court's rulings here. The trial court acted well within its discretion in granting respondent relief from the default and the default

judgment and in awarding attorney fees and costs reasonably incurred in connection with the default proceedings.

Section 473(b) provides that a court must grant relief from default and a default judgment under certain circumstances, and has discretion to do so even when those circumstances are not met. A court “*shall*” grant such relief “whenever an application for relief is made, no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney’s sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect . . . unless the court finds that the default or dismissal was not in fact caused by the attorney’s mistake, inadvertence, surprise, or neglect.” (Section 473(b).) In short, a proper “declaration of the attorney deprives the trial court of discretion to deny relief.” (*Billings v. Health Plan of America* (1990) 225 Cal.App.3d 250, 256, superseded by statute on other grounds as stated in *Leader v. Health Industries of America, Inc.* (2001) 89 Cal. App.4th 603, 617.)

Alternatively, section 473(b) states that a court “*may*, upon any terms as may be just, relieve a party or his or her representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. . . .” “The range of attorney conduct for which relief can be granted in the mandatory provision is broader than that in the discretionary provision, and includes inexcusable neglect.” (*Leader v. Health Industries of America, Inc., supra*, 89 Cal. App.4th at 616.)

Respondent sought relief pursuant to section 473(b) due to surprise without distinguishing between that provision’s mandatory and discretionary provisions, but he makes clear that he is moving under both provisions in his brief. “ ‘Surprise’ ” is defined as “ ‘some condition or situation [that] ordinary prudence could not have guarded against.’ ” (*Credit Managers Assn. v. National Independent Business Alliance* (1984) 162 Cal.App.3d 1166, 1173, citing *Baratti v. Baratti* (1952) 109 Cal.App.2d 917, 921.)

In its November 25, 2003, order, the trial court stated that it was granting the motion “based on the declaration of [respondent’s] counsel that she did not receive [appellants’] most recent amended complaint,” although respondent’s counsel “may have known on August 11, 2003, of [appellants’] intent to request entry of default,” thereby indicating that it found that the default was caused by surprise.⁴ The court also found that respondent’s timing of its motion “does not constitute delay so significant as to warrant denial of the Motion.”

The court’s findings are supported by Cohee’s declaration, which refers to the “most recent amended complaint” and other documents that the court ordered appellants to serve, states that “[respondent’s] counsel never received any of these documents,” and attaches her August 11, 2003, letter to Ralph informing him that her offices had not received certain documents. The trial court indicated it believed Cohee’s statements, a finding that we see no reason to disturb. “ ‘When an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed.’ ” (*Lynch v. Spilman* (1967) 67 Cal.2d 251, 259.) Also, while not expressly relied upon by the court, respondent’s counsel’s subsequent conduct, including the filing of the September 3, 2003, case management conference statement, attendance at the September 19, 2003, case management conference, and failure to appear at the September 25, 2003, civil uncontested hearing further supports the court’s finding of surprise. Otherwise, it makes

⁴ The court’s November 25, 2003, order granted respondent’s motion without distinction between the mandatory and discretionary provisions. This was appropriate because the surprise analysis is virtually the same under either provision.

no sense for respondent's counsel to participate in these proceedings, but not oppose the default itself.

Appellants contend that there are several reasons why we should reverse the trial court's order. First, appellants argue that Cohee's declaration does not state facts sufficient to constitute grounds for relief. In support of this contention, appellants' opening brief cites two cases in which courts found no basis for allowing relief from default, *Transit Ads, Inc. v. Tanner Motor Livery, Ltd.* (1969) 270 Cal.App.2d 275, 282 (*Transit Ads*), and *Aheroni v. Maxwell* (1988) 205 Cal.App.3d 284, 292 (*Aheroni*), but respondents fail to explain the relevance of these cases. *Transit Ads* was decided under an old standard for relief that required the moving party to also show a meritorious defense that is no longer in force (*Transit Ads, supra*, 270 Cal.App.2d at 288; see *Uriarte v. United States Pipe & Foundry Co., supra*, 51 Cal.App.4th at 787-790), and analyzed the court's rulings regarding excusable neglect, not surprise. (*Transit Ads, supra*, 270 Cal.App.2d at 288.) The court held that counsel's deteriorated physical condition, which he claimed had caused him to attend to his legal obligations only intermittently, was not a sufficient basis for an excusable neglect finding, and that the moving party had not filed an affidavit of merits. (*Id.* at 285-288.) None of these issues are relevant here, where the trial court simply concluded that respondent's counsel did not receive documents as Cohee stated in her declaration.

Aheroni is even farther afield because it involved a motion analyzed not under section 473(b), but under the court's general equitable powers. (*Aheroni, supra*, 205 Cal.App.3d at 290.) The court found the moving party's declaration wanting because he based his motion on the purported fraud of the opposing party, but declared his failure to act was due to jail conditions rather than any reliance on statements by the opposing party. (*Ibid.*) That is not relevant to this case either.

In their reply brief, appellants also cite *Todd v. Thrifty Corp.* (1995) 34 Cal.App.4th 986, 992, contending that, as in that case, respondent's counsel is attempting

to change the facts to blame herself for the entry of judgment. That case also dealt with neglect rather than surprise, and a moving party who first sought discretionary relief due to his illness, and then switched to seeking mandatory relief based upon purported attorney fault. (*Id.* at 991.) Here, on the other hand, respondent has always maintained the default was the result of surprise, which the trial court relied upon for its ruling. *Todd v. Thrifty Corp.*, *supra*, 34 Cal.App.4th 986, therefore, is inapposite as well.

Appellants also contend that the trial court “found” that respondent’s motion was “factually devoid of evidence in support of the plead grounds of mistake, inadvertence, and/or excusable neglect,” citing certain comments the court made at the November 19, 2003, hearing on the motion. This is not relevant to the court’s finding of surprise. Moreover, the court made no such finding, as is evident from our careful review of the transcript of the hearing and the court’s November 25, 2003, order.

Next, appellants argue, again citing *Transit Ads* and *Aheroni*, that respondent’s motion was not made in a reasonable period of time because it was filed almost two months after appellants contend respondent knew of the default. *Transit Ads* actually supports respondent’s position, as the appellate court found the trial court did *not* abuse its discretion in finding that an unreasonable period of time had *not* passed when the moving party filed its motion more than a month after receiving notice of the entry of default judgment, and many months after the entry of default. (*Transit Ads*, *supra*, 270 Cal.App.2d at 284-285, 288.) *Aheroni* challenged a default by motion filed more than six months after entry of default, and more than five months after entry of the default judgment, a delay much greater than any involved here. (*Aheroni*, *supra*, 205 Cal.App.3d at 289-291.) The trial court’s November 25, 2003, order indicates the court concluded that respondent’s counsel *might* have known of appellants’ intent to request entry of default as of August 11, 2003, and that respondent’s subsequent filing of its motion 57 days later was not so significant a delay as to warrant denial of the motion. Appellants

have not provided a single legal or factual basis for disturbing this ruling based on abuse of discretion, and we see no reason to do so.

Finally, appellants contend that the trial court “abused its duty of impartiality, by building [respondent’s] case,” purportedly building a defense of mandatory relief that respondent would not have otherwise argued. This argument is utterly without support. The hearing transcript reveals a trial court dutifully engaging counsel in legal argument and nothing more. The court’s inquiries to moving counsel regarding mandatory relief made complete sense, since respondent moved for mandatory relief in its papers.

As for appellants’ contention that the trial court abused its discretion in limiting its award to them to \$2,387.50 for attorney fees and costs incurred in connection with the default proceedings, the trial court is best able to determine the reasonableness of such fees and costs. We agree with our Supreme Court which has stated, “We have held, and remain convinced, that an ‘ “experienced trial judge is the best judge of the value of professional services rendered in his court.” ’ ” (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 752.) Appellants’ claim that the trial court abused its discretion is unsupported by a single legal citation. Appellants reargue their fees and costs as if they were appearing in the court below, including arguing points that they did not make to the trial court. Appellants fail to explain, however, why the trial court’s ruling was without reason and, therefore, an abuse of discretion. To the contrary, the record shows that the trial court considered appellants’ counsel’s declarations and arguments, and determined a reasonable amount of fees and costs for pursuing the default was \$2,387.50, taking into account counsel’s \$225 an hour fee, which both the court and respondent’s counsel indicated at hearing was not a concern. The trial court’s determinations indicate it found respondent’s counsel’s charges were unreasonable in some cases. We do not disagree. For example, respondent’s counsel billed at his full rate for his travel to and from the court to obtain the judgment, and to and from the county recorder’s office to file an

abstract of judgment, work more appropriate for legal assistants or services than attorneys charging \$225 an hour.

In rearguing his request for fees and costs, appellants' counsel makes the unfortunate choice of launching an ad hominem attack on the entire judiciary, stating, "[t]he Trial Court's award is demonstrative of a judiciary that hails from an ivory tower, feeds from the public trough, engages in depression era economics, has many servants at its beck and call, lives behind iron gated communities, and which, therefore, having divorced itself from the community in which it serves, has no concept whatsoever, of the time, expense, study, and effort, it takes to get things done, particularly, in Alameda County Superior Court." Appellants' counsel's attack convinces us that we should address what is most noticeable from the parties' papers: the lack of professional civility and courtesy displayed by counsel in this action.

Since the trial court's entry of default more than one year ago, the parties have engaged in an unnecessary detour from the merits of this dispute that could have been avoided, but for the decided lack of professional civility and courtesy between opposing counsel in the course of a simple dispute over service of an amended complaint. It might have been avoided by any one of a number of minimally courteous acts, such as if respondent had contacted appellants' new counsel upon receipt of his August 4, 2003, letter to inform him of the court's June 16, 2003, case management conference order regarding service; if appellants' new counsel reserved the papers respondent's counsel represented she had not received; or if appellants' counsel had followed, rather than ignored, the ethical and eminently reasonable, common-sense course and warned opposing counsel before filing the request for entry of default. Instead, like petulant children, counsel, almost immediately upon encountering each other, began freely accusing each other of acts of egregious fraud and perfidy. Rather than attempting to resolve their simple service and notice issues, they drafted letters and filed papers pressing their advantage and assigning blame. The record is full of posturing and harsh

accusations on both sides. It is virtually devoid of effort by either counsel to resolve their misunderstandings without court intervention. Counsel have not served their clients or the bar best by eagerly racing into battle without first determining if it is necessary or appropriate to do so.

As already mentioned, appellants' counsel also could not resist making unfounded personal attacks on the trial court in his appellate papers because he disagreed with its decision. Along with the attack we quote above, appellants' counsel concludes in his opening brief, "[i]f the Trial Court's intention was to a) dissuade San Francisco attorneys from i) entering its bounds, ii) assisting its poor litigants, and/or ii) [sic] performing competently in its courts, and/or b) reward i) abuse of process, and/or b) [sic] the slovenly process of law, it has done a fantastic job."

Appellants' counsel's bombastic ad hominem attacks have no place in an appellate brief and are potentially sanctionable behavior. "[A]n opening brief is not an appropriate vehicle for an attorney to 'vent his spleen' This is because, once the brief is filed, both the opponent and the state must expend resources in defending against and processing the appeal. Thus, an unsupported appellate tirade is more than just words on paper; it represents a real cost to the opposing party and to the state." (*Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 32-33 [awarding sanctions for frivolous arguments unsupported by the record made in an opening appellate brief].)

We decline to award sanctions based on appellants' counsel's patently ridiculous attacks because they have warranted only a minimal expenditure of our resources and have been wisely left unaddressed by respondent. However, we strongly advise appellants' counsel to conduct himself in a more professional manner when appearing before this or any other court.

We deny respondent's requests that we award him his attorney fees in connection with this appeal or sanction appellants' counsel for bringing a frivolous appeal.

DISPOSITION

We affirm the trial court's November 25, 2003, order in its entirety. We deny all of appellants' and respondent's other requests, except that we award costs to respondent as the prevailing party.

Lambden, J.

We concur:

Haerle, Acting P. J.

Ruvolo, J.